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# OUT OF THE WOODS : Sino-Forest, Third-Party Releases & the Relationship Between Insolvency & Class Action Law

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## **OUT OF THE WOODS**

***Sino-Forest, Third-Party Releases & the Relationship Between Insolvency & Class Action Law***

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**The Undergraduate Awards, 2014**

## **ABSTRACT**

Under Canada's *Companies' Creditors Arrangement Act* RSC 1985, c C-36 ("CCAA"), a restructuring plan typically releases creditor claims against the debtor company. Occasionally, a restructuring plan will also release creditor claims against third parties, such as the debtor's auditor. These releases are known as third-party releases. Third-party releases are a controversial feature of Canadian restructuring proceedings. Nonetheless, the approval of third-party releases is an emerging trend under the CCAA.

In 2013, Morawetz J approved a \$117 million settlement in an Ontario class action. The settlement was approved as a part of the Sino-Forest Corporation CCAA proceeding. It gave Ernst & Young a full third-party release and barred opt-outs. Some class members argued that the settlement was unrelated to the restructuring and that it violated their opt-out rights under Ontario's class action legislation. Morawetz J approved the settlement with the third-party release, holding that opt-out rights can be compromised in a CCAA proceeding. Thus, his decision is significant to both insolvency and class action law. This paper analyzes the decision and its implications.

The decision demonstrates that CCAA courts are increasingly willing to approve third-party releases, which is a positive development in the law. Proper third-party releases can lead to faster negotiations, larger settlements and smoother restructurings. Thus, releases can maximize benefits for stakeholders and minimize strain on the courts. The decision also clarifies the relationship between the CCAA and class action legislation, striking a suitable balance between insolvency and class action policy goals.

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## INTRODUCTION

In 2013, Morawetz J approved a \$117 million settlement in an Ontario class action.<sup>1</sup> The settlement resolved claims by security holders of Sino-Forest Corporation (“SFC”) against Ernst & Young (“E&Y”) in relation to auditing work for SFC (the “EY Settlement”). It made headlines as the largest-ever auditor settlement in a Canadian securities class action.<sup>2</sup> Significantly, it was approved as a part of SFC’s *Companies’ Creditors Arrangement Act*<sup>3</sup> (“CCAA”) proceeding. Thus, the *Sino-Forest Settlement* decision is significant to both insolvency and class action law.

The EY Settlement gave E&Y a full third-party release<sup>4</sup> and barred opt-outs. Some class members argued that the EY Settlement was unrelated to SFC’s restructuring and that it violated their opt-out rights under Ontario’s *Class Proceedings Act*<sup>5</sup> (“CPA”). Morawetz J approved the EY Settlement, holding that CPA opt-out rights can be compromised in a CCAA proceeding.

*Sino-Forest Settlement* reveals that CCAA courts are increasingly willing to approve third-party releases, which is a positive development in the law. Proper third-party releases can lead to faster negotiations, larger settlements and smoother restructurings. Thus, releases can maximize benefits for stakeholders and minimize strain on the courts. Morawetz J also clarified the relationship between the CCAA and the CPA, striking a suitable balance between insolvency and class action policy considerations. This paper analyzes the decision and its implications.

### 1. SINO-FOREST SETTLEMENT

In 2011, security holders brought class actions against SFC, naming E&Y as a defendant. SFC obtained CCAA protection. A stay of proceedings was extended to claims against E&Y. The

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<sup>1</sup> *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2013 ONSC 1078 [*Sino-Forest Settlement*], leave to appeal to CA refused, 2013 ONCA 456 [*Sino-Forest Appeal 1*], leave to appeal to SCC refused, [2013] SCCA No 395 (QL) [*Sino-Forest Appeal 2*].

<sup>2</sup> See e.g. Jeff Buckstein, “E&Y agrees to record settlement”, *The Bottom Line* 29:3 (March 2013) (QL).

<sup>3</sup> RSC 1985, c C-36 [CCAA].

<sup>4</sup> “Third-party release” refers to the release of a claim against a party other than the debtor (e.g. the debtor’s auditor).

<sup>5</sup> SO 1992, c 6, s 9 [CPA].

settlement framework was added to SFC's CCAA plan (the "SFC Plan"). The EY Settlement provided that E&Y would pay \$117 million for a third-party release with no opt-outs. Six institutional shareholders (the "Objectors") opposed the EY Settlement and purported to opt out. They argued that it violated their CPA opt-out rights and was unnecessary to the SFC Plan.

### **1.1. Morawetz J Approves the EY Settlement**

#### **(a) There is No Right to Opt Out Under the CCAA**

Fundamentally, Morawetz J reasoned that the class proceedings were inseparable from the CCAA proceeding. The EY Settlement was part of a CCAA plan. The class action claims against E&Y stemmed from the claims against SFC. E&Y had a contractual right to contribution and indemnity against SFC, which was triggered by the class action claims (the "Indemnity Claim"). As a result, all of the class action claims were a part of the CCAA proceeding. The Objectors did not file an individual proof of claim, which meant class counsel could agree to a binding CCAA compromise on their behalf. Thus, the Objectors were trying to opt out of a CCAA compromise. Morawetz J held that it is impossible to opt out of a CCAA compromise.<sup>6</sup>

#### **(b) CCAA Factors for Approving Settlements & Third-Party Releases**

Morawetz J applied two overlapping sets of CCAA factors in approving the settlement. First, he set out the following general test:

- (i) whether the settlement is fair and reasonable;
- (ii) whether it provides substantial benefits to other stakeholders; and
- (iii) whether it is consistent with the purpose and spirit of the CCAA.<sup>7</sup>

Second, approving the third-party release required applying the "nexus test" established by the Ontario Court of Appeal.<sup>8</sup> Morawetz J listed four factors to be considered when deciding

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<sup>6</sup> *Sino-Forest Settlement*, *supra* note 1 at para 36: "Claims...are regularly compromised and settled within CCAA proceedings. This includes outstanding litigation claims against the debtor and third parties. Such compromises fully and finally dispose of such claims, and it follows that there are no continuing procedural or other rights in such proceedings. Simply put, there are no "opt-outs" in the CCAA [emphasis added]."

<sup>7</sup> *Ibid* at para 49, citing *Robertson v ProQuest Information & Learning Co*, 2011 ONSC 1647 at para 22 [*Robertson*].

if there is “a reasonable connection between the third party claim being compromised...and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan”:<sup>9</sup>

- (i) are the claims to be released rationally related to the purpose of the plan?
- (ii) are the claims to be released necessary for the plan of arrangement?
- (iii) are the parties who have claims released against them contributing in a tangible and realistic way?
- (iv) will the plan benefit the debtor and the creditors generally?

(c) The CCAA Factors Supported the EY Settlement & Third-Party Release

Morawetz J held that a “significant aspect” of SFC’s plan was a distribution of settlement funds to relevant stakeholders.<sup>10</sup> The \$117 million was the only funding for the distribution. Without the release E&Y would not provide the funds, and a key goal of the SFC Plan would remain unfulfilled. The \$117 million was a substantial, tangible contribution. Thus, Morawetz J rejected the claim that the EY Settlement was unnecessary or unrelated to the SFC Plan.

As well, Morawetz J noted that the third-party release was integral to the SFC Plan. The Objectors’ claims against E&Y were inextricably linked to E&Y’s Indemnity Claim. Without the release, the litigation against E&Y would continue. The litigation would then become “circular in nature” due to the Indemnity Claim against SFC.<sup>11</sup> Thus, Morawetz J was satisfied that the third-party release for E&Y was rationally connected and necessary to the SFC Plan.

Overall, Morawetz J held that the settlement was fair and reasonable, benefitted stakeholders, and was consistent with the CCAA.<sup>12</sup> Several notable findings supported his decision. First, a large majority of creditors approved the SFC Plan with notice of the effect of the releases. Second, the release was not too broad or offensive to public policy. Third, claimants

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<sup>8</sup> *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 [*ATB Financial*].

<sup>9</sup> *Sino-Forest Settlement*, *supra* note 1 at para 50, citing *ATB Financial*, *supra* note 8 at para 70.

<sup>10</sup> *Ibid* at para 60.

<sup>11</sup> *Ibid* at para 62.

<sup>12</sup> *Ibid* at para 66.

would receive \$117 million while avoiding the risks of further litigation. Finally, Morawetz J accepted that without the EY Settlement, the Indemnity Claim would have to be finally determined to calculate the CCAA claims. The EY Settlement avoided delays and litigation that may have depleted SFC's assets. The release of the Indemnity Claim "allowed SFC and the SFC subsidiaries to contribute their assets unencumbered by claims totaling billions of dollars."<sup>13</sup> Thus, the EY Settlement benefitted the SFC Plan, the debtor and SFC creditors generally.

## **1.2. Refusal of the Leave Applications**

The Objectors sought to appeal the orders sanctioning the SFC Plan and EY Settlement. The Ontario Court of Appeal refused leave, finding that the appeal from the sanction order was moot because the SFC Plan was already in place.<sup>14</sup> The Court also found that Morawetz J applied the correct tests for approving CCAA settlements and third-party releases. In 2014, the Supreme Court of Canada also refused leave to appeal.<sup>15</sup> Thus, *Sino-Forest Settlement* remains the most current leading case on third-party releases and the interplay between the CPA and the CCAA.<sup>16</sup>

## **2. IMPLICATIONS**

### **2.1. The Appropriate Test is the Nexus Test, not an Exceptional Circumstances Test**

A CCAA plan typically releases creditor claims against the debtor. Occasionally, a plan will also release creditor claims against third parties. Prior to SFC's insolvency, the approval of broad third-party releases was an emerging trend in CCAA proceedings.<sup>17</sup> However, Canadian case law sends mixed messages as to when third-party releases are justifiable. An early decision

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<sup>13</sup> *Ibid* at paras 68.

<sup>14</sup> *Sino-Forest Appeal 1*, *supra* note 1 at para 11.

<sup>15</sup> *Sino-Forest Appeal 2*, *supra* note 1.

<sup>16</sup> Notably, the United States Bankruptcy Court in the Southern District of New York recently recognized the EY Settlement, applying the principle of comity: *Re Sino-Forest Corp*, 501 BR 655 (Bankr SDNY 2013).

<sup>17</sup> *Re Muscletech Research and Development Inc* (2007), 30 CBR (5<sup>th</sup>) 59 [*Muscletech*]; *ATB Financial*, *supra* note 8; *Re Grace Canada Inc* (2008), 50 CBR (5<sup>th</sup>) 25 [*Grace*]; *Re Nortel Networks Corp*, 2010 ONSC 1708 [*Nortel*]; *Re Allen-Vanguard Corp*, 2011 ONSC 4208 [*Vanguard*].



rejected third-party releases as an abuse of the CCAA.<sup>18</sup> As well, some decisions stress such releases “should be the exception” and should not be not granted “as a matter of course.”<sup>19</sup> There is also arguably a pattern in Canadian law to suggest an “exceptional circumstances” standard.<sup>20</sup>

However, an exceptional circumstances standard is undesirable. CCAA releases are not justified based on the uniqueness of the situation. The nexus between the release and the restructuring plan, coupled with the flexibility of the CCAA, is what engages a CCAA court’s jurisdiction.<sup>21</sup> Morawetz J appropriately refocused the analysis on whether the third-party release can be justified as part of a “comprehensive compromise.”<sup>22</sup> The nexus test prevents abuse by ensuring third parties only earn releases through significant contributions to a CCAA plan. Thus, past warnings can be read as a “word of caution” rather than a “substantive shift in approach.”<sup>23</sup>

## **2.2. “Necessary for the Plan” can Mean Necessary for a “Significant Aspect” of the Plan**

Some cases suggest that the entire CCAA plan must depend on the third-party release to satisfy the nexus test.<sup>24</sup> *Sino-Forest Settlement* demonstrates that a release can be justified if it is necessary for a “significant aspect” of the plan.<sup>25</sup> The SFC Plan was already in place, indicating

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<sup>18</sup> *Steinberg Inc c Michaud* (1993), 42 CBR (5th) 1 at paras 65-68 (QCA).

<sup>19</sup> *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at paras 28-29 [*Canwest*]; *Vanguard*, *supra* note 17 at paras 60-61

<sup>20</sup> *Muscletech* involved a “unique liquidation plan”: *supra* note 17 at para 2. *ATB Financial* involved a plan to correct a “liquidity crisis” affecting the entire asset-backed commercial paper industry: *supra* note 8 at paras 56-57.

<sup>21</sup> *ATB Financial*, *supra* note 8 at paras 43, 70. See also *Century Services v Canada (Attorney General)*, 2010 SCC 60 at paras 14-15, 62-63 [*Century Services*]. CCAA s 11 authorizes a court to make any order it considers appropriate on an application in respect of a debtor: *supra* note 3. Thus, Parliament granted courts broad general discretionary powers that make the CCAA flexible.

<sup>22</sup> *Sino-Forest Settlement*, *supra* note 1 at para 47, citing *ATB Financial*, *supra* note 8 at paras 69-70.

<sup>23</sup> Adam C Maerov, Tushara Weerasooriya & Ahsan Mirza, “The Use of Releases in CCAA Restructuring Proceedings: How Wide is the Net?” (Paper delivered at the OBA Institute of Continuing Professional Development, 3-5 February 2011), [unpublished].

<sup>24</sup> *Ibid* at 19: “In both *ATB Financial* and *Muscletech*, the funding to be provided by the released parties (and therefore the plan itself) was contingent upon the third parties being released. Therefore, the existence of the plan, as opposed to its probability of success, depended on the compromise of claims in favour of those parties.”

<sup>25</sup> *Sino-Forest Settlement*, *supra* note 1 at para 60.

it was not contingent on the EY Settlement.<sup>26</sup> Further, the release did not seem necessary to give effect to the release of E&Y's Indemnity Claim. *Re Sino-Forest*<sup>27</sup> established that the Indemnity Claim was an "equity claim", which meant it was subordinated under the CCAA.<sup>28</sup> The SFC Plan cancelled all "equity claims" on the plan implementation date, prior to settlement approval. The Objectors seized on this argument in their first leave application. They characterized the EY Settlement as an "eleventh-hour add on" with a collateral purpose unrelated to the restructuring.<sup>29</sup>

As a matter of policy, E&Y's release can be justified even if it was not required to release the Indemnity Claim. First, the settlement distribution was a *significant aspect* of the SFC Plan. Thus, the SFC Plan could not *fully* succeed without the release. Second, releases can incentivize third parties to participate in a restructuring.<sup>30</sup> Notably, section 5.1(1) of the CCAA was enacted to encourage directors to stay in office and help restructurings.<sup>31</sup> Auditors are analogous to directors, as their cooperation can be crucial to a plan. SFC called E&Y a "catalyst" in securing plan approval.<sup>32</sup> Morawetz J accepted that E&Y helped the process along and reduced costs.<sup>33</sup>

Third, CCAA proceedings involve balancing competing interests. In *Century Services*, the Supreme Court of Canada explained that a CCAA court must consider "all of the various interests at stake in the reorganization...even other parties doing business with the insolvent company."<sup>34</sup> This is especially true where a third party has indemnity claims against the debtor that have been

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<sup>26</sup> *Ibid* at paras 60-62. The EY Settlement was contingent on court approval, but the core of the SFC plan was already in place. It involved the transfer of most of SFC's assets to a new creditor-owned corporation called Newco.

<sup>27</sup> 2012 ONSC 4377, aff'd 2012 ONCA 816 [*Re Sino-Forest Appeal*].

<sup>28</sup> In 2009, the CCAA was amended to subordinate equity claims until all other creditor claims are paid in full: CCAA, *supra* note 3 at s 6(8). *Re Sino-Forest Appeal* confirmed that the CCAA definition of "equity claim" in s 2 includes both shareholder claims and auditors' indemnity claims arising from shareholder claims. Effectively, this meant that E&Y faced liability for the entirety of the shareholders' claims, without any contribution from SFC.

<sup>29</sup> *Sino-Forest Settlement Appeal 1*, *supra* note 1 (Factum of the Appellant at paras 68-70).

<sup>30</sup> Janis Sarra, "Restructuring of the Asset-Backed Commercial Paper Market in Canada" (2008) 9 Ann Rev Insolv L at 10 (WL Can).

<sup>31</sup> *NBD Bank, Canada v Dofasco Inc*, 181 DLR (4th) 37 at para 54 (Ont CA), citing LW Houlden and CH Morawetz, *The Annotated Bankruptcy and Insolvency Act: 2000* (Toronto: Carswell, 1999) at 192.

<sup>32</sup> *Sino-Forest Settlement*, *supra* note 1 at para 56.

<sup>33</sup> *Ibid* at paras 67-70.

<sup>34</sup> *Supra* note 21 at para 60.

subordinated by the CCAA. Regardless of whether E&Y released its Indemnity Claim directly in exchange for its third-party release, the SFC Plan extinguished E&Y's rights against SFC. As a directly affected stakeholder in the SFC Plan, E&Y's interests also had to be considered.

Morawetz J fairly balanced the interests of all relevant stakeholders. The class members, including the Objectors, received a sizable settlement. In exchange, E&Y received a third-party release. The general creditors benefitted from E&Y's participation and the release of the Indemnity Claim. In sum, the release maximized the available benefits for all stakeholders.

Fourth, if the Objectors opted out, it would have harmed other claimants. The settlement would have unraveled without E&Y's release, and all parties would have incurred further legal expenses. The Objectors were but a fraction of SFC shareholders.<sup>35</sup> As noted by Morawetz J, the CCAA requires considering the interests of similarly situated stakeholders as a whole.<sup>36</sup> Thus, opt-outs would have undermined the spirit of compromise underlying the CCAA.

Finally, the release fell within the jurisdiction of the CCAA court and was in line with the goals of the CCAA. The Ontario Court of Appeal has found that the authority to grant third-party releases is implicit in the CCAA.<sup>37</sup> As well, the Supreme Court of Canada has held that the CCAA is a "flexible mechanism" for achieving the purpose of avoiding the "social and economic costs" of liquidation.<sup>38</sup> Complex reorganizations often require courts to find creative ways to minimize economic costs for stakeholders. The Supreme Court of Canada specifically noted third-party releases as a creative measure courts can approve to help a restructuring.<sup>39</sup> Thus, E&Y's release

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<sup>35</sup> *Sino-Forest Settlement*, *supra* note 1 at para 79. The Objectors held just 1.6% of SFC shares, and constituted "approximately 0.24% of the 34,177 SFC beneficial shareholders as of April 29, 2011."

<sup>36</sup> *Ibid* at paras 70, 74.

<sup>37</sup> *ATB Financial*, *supra* note 8 at para 43.

<sup>38</sup> *Century Services*, *supra* note 21 at paras 14-15.

<sup>39</sup> *Ibid* at para 62.

seems justifiable under the CCAA in light of E&Y's (1) sacrifice of its Indemnity Claim; (2) active participation in the SFC Plan; and (3) large monetary contribution to the security holders.

### **2.3. Fraud & the Scope of Third-Party Releases**

The third-party release in the EY Settlement was broad enough to include fraud claims. Morawetz J confirmed that releases could extend to claims for fraud.<sup>40</sup> The appropriate scope of releases is a contentious issue that raises public policy arguments.<sup>41</sup> Several court-approved releases have included carve-outs for fraud and wilful misconduct.<sup>42</sup> While director releases are permitted under the CCAA, releases for misrepresentations are prohibited.<sup>43</sup> It will be interesting to see if there is a legislative response to the judicial treatment of releases that encompass fraud. For now, CCAA courts appear to be open to approving increasingly broad releases.

### **2.4. The Interaction Between Class Proceedings & CCAA Proceedings**

#### **(a) Pre-Sino-Forest Settlement Tensions between the CCAA and the CPA**

The CPA allows multiple plaintiffs to litigate common issues in one representative action. It promotes three objectives: judicial economy, access to justice and behaviour modification.<sup>44</sup> The CPA affords all class members the right to opt out of a class action.<sup>45</sup> Opt-out rights are a fundamental element of procedural fairness in class actions.<sup>46</sup> Under the CCAA, a debtor may obtain an order staying any action,<sup>47</sup> and stays can be extended to class actions against third

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<sup>40</sup> *Sino Forest Settlement*, *supra* note 1 at para 48, citing *ATB Financial*, *supra* note 8 at para 111.

<sup>41</sup> See *ATB Financial*, *supra* note 8 at para 110.

<sup>42</sup> See *Canwest*, *supra* note 19; *ATB Financial*, *supra* note 8; *Nortel*, *supra* note 17.

<sup>43</sup> CCAA, *supra* note 3, s 5.1(1). As well, section 19(2)(d) prohibits releasing claims for fraud and other wilful misconduct unless the individual creditor votes to accept the compromise. However, the provision appears to apply to claims against debtors, not third parties. 19(2)(d) also provides that it does not apply to equity claims.

<sup>44</sup> *Hollick v Toronto (City)*, [2001] 3 SCR 158 at para 28.

<sup>45</sup> CPA, *supra* note 5, s 9. The CPA guards against extinguishing claimants' rights to pursue individual actions.

<sup>46</sup> *Sauer v Canada (Attorney General)*, 2010 ONSC 4399 at para 19.

<sup>47</sup> CCAA, *supra* note 3, s 11.02.

parties.<sup>48</sup> CCAA courts can approve binding class action settlements under the CCAA, including those containing full third-party releases.<sup>49</sup> Thus, the CCAA can conflict with CPA opt-out rights.

Early cases did not fully clarify the interplay between the CCAA and the CPA. Decisions involving both statutes tended to be “styled in both proceedings.”<sup>50</sup> In *Roberston*, Pepall J applied the tests for settlement approval from both statutory regimes.<sup>51</sup> Pepall J noted “a certain symmetry” between the CCAA and CPA tests, and approved the settlement under both.<sup>52</sup> In *McCarthy v Canadian Red Cross Society*,<sup>53</sup> Winkler J called the tests “markedly different.”<sup>54</sup> Interestingly, he initially rejected a third-party release, noting that class members needed more information “to decide whether to exercise their right to opt out.”<sup>55</sup> His reasoning suggested that CPA opt-out rights apply to class action settlements approved under the CCAA. Thus, the pre-*Sino-Forest Settlement* case law did not fully clarify the relationship between two statutes.

(b) The CCAA is Paramount to the CPA

Morawetz J noted that class action settlements require court approval of the settlement and the “notice and process for dissemination of the settlement.”<sup>56</sup> Thus, a CCAA court will afford the basic procedural protections of the CPA. However, unlike the cases discussed above, Morawetz J approved the settlement based solely on the substantive tests used under the CCAA.

His decision also clarifies the relationship between the CCAA and the CPA in a conflict. In effect, Morawetz J held that the doctrine of paramountcy applies. If a claim is entangled with

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<sup>48</sup> This is appropriate if the debtor agreed to indemnify the third party and the claims against the third party arise from claims against the debtor: *Re Muscletech Research and Development Inc* (2006), 25 CBR (5<sup>th</sup> 231) at paras 7-9.

<sup>49</sup> See *Muscletech*, *supra* note 17; *Grace*, *supra* note 17; *Vanguard*, *supra*, note 17.

<sup>50</sup> Jay A Swartz & Natasha J MacPharland, “*Canwest Publishing: A Tale of Two Plans*” (2010) 2 Ann Rev Insolv L at 27 (WL Can).

<sup>51</sup> *Supra* note 7 at paras 20-26. The test for approving class actions settlements is whether “in all of the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it.”

<sup>52</sup> *Ibid.*

<sup>53</sup> [2001] OJ No 567 (QL) (ONSC).

<sup>54</sup> *Ibid* at para 15.

<sup>55</sup> *Ibid* at para 23. He later approved the release with no mention of opt-out rights: [2001] OJ No 2474 (QL) (ONSC).

<sup>56</sup> *Sino-Forest Settlement*, *supra* note 1 at para 38 citing *Robertson*, *supra* note 20 at para 8.

CCAA claims, it is subject to compromise. There is no right to opt out of a CCAA compromise. On this point, Justice Morawetz's decision is in line with the Ontario Court of Appeal's decision in *ATB Financial*.<sup>57</sup> Opt-out rights are fundamental in class actions, and will not be extinguished lightly under the CCAA. However, if CPA and CCAA proceedings overlap, "opt out rights must be considered within the umbrella of rights afforded under both legislative regimes".<sup>58</sup>

#### (b) Other Practical Implications

The availability of broader releases during CCAA proceedings gives third parties a strong incentive to reach timely settlements. In light of the ruling subordinating indemnity claims in *Re Sino-Forest Appeal*, auditors defending securities class actions face exposure to greater potential liability. Given that security holders are also effectively unable to recover from a CCAA debtor, solvent auditors make attractive defendants. Thus, auditors will be anxious to cap their liability.

This can create a "win/win" situation for security holders and third parties.<sup>59</sup> Security holders can use third-party releases to leverage larger settlements from third party defendants. *Sino-Forest Settlement* demonstrates a creative way to effect a distribution to equity claimants under a CCAA plan, despite the subordination of equity claims under the CCAA.<sup>60</sup> Justice Morawetz recently approved the settlement distribution process, which sets aside \$5 million for

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<sup>57</sup> *Supra* note 8 at para 104: "The power to sanction a plan of compromise or arrangement that contains third-party releases...is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action...is constitutionally immaterial. The CCAA is a valid exercise of federal power. Provided the matter in question falls within the legislation directly or as necessarily incidental to the exercise of that power, the CCAA governs. To the extent that its provisions are inconsistent with provincial legislation, the federal legislation is paramount."

<sup>58</sup> Michael A Eizenga, *Class Actions Law and Practice*, loose-leaf (consulted on March 18, 2014) (Markham ON: LexisNexis Canada, 2008), ch 5 at 5.78.4.

<sup>59</sup> Robert W Staley, Derek J Bell & Jonathan G Bell, "Sino-Forest: More Lessons as a Chapter Closes" (17 March 2014), online: Bennett Jones <[http://www.bennettjones.com/Publications/Updates/Sino-Forest\\_\\_More\\_Lessons\\_as\\_a\\_Chapter\\_Closes/](http://www.bennettjones.com/Publications/Updates/Sino-Forest__More_Lessons_as_a_Chapter_Closes/)>.

<sup>60</sup> Presumably, this is permissible because the underlying purpose of CCAA s 6(8) is to prevent the depletion of the debtor's assets that are available to satisfy general creditors' claims: *Re Sino-Forest Appeal*, *supra* note 27 at para 55. Settlement proceeds from claims against third parties are not assets of the debtor that are available to general creditors, and thus can be distributed directly to equity claimants under a CCAA plan.

noteholders and establishes a claims process for shareholders.<sup>61</sup> Thus, equity claimants can recover part of their losses through a CCAA process and avoid risky litigation. In return, third parties receive a firm cap on their liability, avoiding exposure to further litigation. Firms will be willing to pay more for that level of certainty and control. Evidently, third-party releases can lead to mutually beneficial settlements for security holders and third parties under the CCAA.

Finally, *Sino-Forest Settlement* sends a clear message that class members wishing to protect their individual rights must participate early in a CCAA process. The Objectors “relinquished” their rights to influence the CCAA proceedings by failing to file an individual proof of claim.<sup>62</sup> As a result, they did not participate in the CCAA process until it was too late. Thus, the decision will encourage affected stakeholders to participate early and actively in CCAA proceedings, which should lead to more efficient and effective restructurings moving forward.

## CONCLUSION

*Sino-Forest Settlement* demonstrates that third-party releases can inspire swifter negotiations, lead to bigger settlements and facilitate better restructurings. If a release has a sufficient nexus to a restructuring, it can be fair and reasonable, beneficial to all stakeholders and consistent with the goals of the CCAA. As well, the decision strikes an appropriate balance between CCAA and CPA policy considerations. The CPA is intended to promote judicial economy, access to justice and behaviour modification. The EY Settlement promoted judicial economy by avoiding lengthy litigation and parallel proceedings. All class members, including the Objectors, will benefit from the distribution of the EY settlement. Thus, EY Settlement promoted access to justice. Finally, the record-setting \$117 million settlement will clearly motivate auditing firms to be more diligent, promoting the goal of behaviour modification.

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<sup>61</sup> *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp*, 2014 ONSC 62 (Claims and Distributions Protocol at paras 8-12).

<sup>62</sup> *Sino-Forest Settlement*, *supra* note 1 at 78. See also Staley, Bell & Bell, *supra* note 59.

The allegations against E&Y were serious, and the \$9.1 billion class action claim reveals that the claimants experienced huge losses. CCAA courts should be wary of extinguishing individual rights in such cases. However, if a third-party release would benefit all stakeholders, opt-outs would undermine the spirit of compromise underlying the CCAA. Disallowing opt-outs motivates claimants to file claims early and to participate actively in the CCAA process. It also motivates third parties to offer fair settlements. Thus, it encourages cooperation under the CCAA.

Ultimately, minority stakeholders' rights must occasionally give way to the best interests of affected stakeholders as a whole. Otherwise, the benefits offered by a CCAA plan will always be at risk of being negated by a "tyranny by the minority."<sup>63</sup> Thus, *Sino-Forest Settlement* is a positive development in insolvency law. Furthermore, it clarifies the relationship between the CCAA and the CPA, which increases certainty for both insolvency and class action practitioners.

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<sup>63</sup> *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp* (2008), 43 CBR (5<sup>th</sup>) 269 (ONSC) at para 138.